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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

STEVEN CHANG,

Plaintiff and Respondent,

v.

ERIC CHANG,

Defendant and Appellant.

G048799

(Super. Ct. No. 30-2011-00487534)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, David R. Chafee, Judge. Affirmed in part and reversed in part.

Thomas Business Law Group, Stephen J. Thomas, and Anthony D. Ross
for Defendant and Appellant.

Linda Ann Chapin for Plaintiff and Respondent.

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Plaintiff Steven Chang (Steven) sued his brother Eric Chang (Eric) alleging Eric violated his fiduciary duties as trustee of a trust of which they were both beneficiaries. After a bench trial, the court ruled largely in favor of Steven and surcharged Eric in excess of \$740,000, in addition to ordering Eric to return a residence to the trust and removing Eric as trustee. Eric appealed, arguing the court employed incorrect legal standards and that the surcharges are not supported by the court's findings and the evidence at trial. We agree in part and will reduce the surcharges. In all other respects, we affirm.

FACTS

Steven and Eric are brothers; their mother was Judy Yu-Teh Chang (Judy). Judy executed a trust in 1985 that was amended and restated in 2007 (the trust). The beneficiaries of the trust are Steven, Eric, Eric's wife, Steven's two children and Eric's three children. The trust dealt specifically with Judy's residence (the residence) and provided that Richard, Eric's son, would have the option to purchase the residence at 20 percent below fair market value at the time of Judy's death. The proceeds of the sale were to be applied to the residue of the trust estate. The trust also provided that upon Judy's death certain oil stocks were to be divided equally between Steven and Eric. The residue of the estate was to be equally divided between all of the beneficiaries. Judy was the initial trustee, and Eric was designated the successor trustee, and his son Richard the next successor trustee.

In addition, Judy executed a durable power of attorney nominating her son Eric as her attorney in fact. Upon Judy being incapacitated, Eric was given "the full power and authority to act for [Judy] and in [Judy's] name, in any lawful way that [Judy herself] could act if [she] were personally present." Of the enumerated powers given to Eric, one was "to make gifts, grants, or other transfers without consideration[,] to or for

the benefit of my descendants or a charitable organization to which I have previously contributed”

Judy suffered a stroke on July 14, 2009. Afterwards, she never left 24-hour custodial care and never went home prior to her death in December 2010. She was unable to communicate after her stroke. From the day of Judy’s stroke onward, Eric considered himself the active trustee. Around that time, the trust had assets of \$4,375.031.26.

Eric is a medical doctor. In 2006, Eric became Judy’s attending physician and began prescribing medication for Alzheimer’s. First he prescribed Aricept in 2006, and then when that did not seem to be having much effect, he added Namenda. He remained her physician up until the time of her stroke, but he did not keep any medical records of her treatment during that period (despite knowing that as a medical professional it was his obligation to do so). On a medical record Eric filled out for Judy for a trip to an orthopedic surgeon in March 2009, Eric indicated she had “Alzheimer’s Dementia.”

Illustrative of her condition, on two occasions Judy got off at the wrong bus stop and the police had to intervene and arrange for Eric to pick her up. Judy also accused Eric of trying to kill her. She complained of people creeping around outside her house, and coming in and stealing things from her. She would also ask repetitive questions (7 or 8 times). Eric gave Judy’s accountants instructions not to take her calls because of the repetitive calls she would make.

In May 2007 Eric opened a joint bank account with Judy at Wells Fargo Bank. It was not in the name of the trust, but, as Eric acknowledged, the monies that came into this account were to be utilized for purposes of the trust. From the time the account was opened, Eric would regularly debit money from the account via automated teller machines (ATM) for various expenses. The day after Judy went to the hospital, Eric transferred \$50,000 from a Charles Schwab account belonging to the trust to the

Wells Fargo account. That next day he also began approximately \$33,000 in renovations to a residence in the trust, which at a later date, Eric would quitclaim to himself.

Over the next 14 months, Eric transferred \$498,000 from the Schwab account to the Wells Fargo account. He funded these transfers in part by selling oil stocks in the Schwab account, in the amount of \$321,849.32. He did not pay Steven his share of the proceeds because he felt he could sell those stocks and use them for general trust purposes prior to Judy's death, at which point Steven would be entitled to 50 percent.

The money transferred from the Schwab account was used to fund, among other things, a series of gifts and donations. In October 2009, Eric made a \$100,000 charitable donation, on behalf of the trust, to California State University Los Angeles, where his wife was chair of the Asian American Studies and Anthropology departments. The only money Judy had previously given to California State University Los Angeles was to pay for tickets to events such as plays, which were \$20 each. Judy had otherwise never made a donation to a university. Eric also caused the trust to donate \$4,000 to Orange County Human Relations, where his wife was a board member. Judy had never previously donated to that organization.

Eric also, on behalf of the trust, gave money to his son's fiancé (\$13,000), his daughter's fiancé (\$10,000), his wife's cousin (two checks for \$10,000 each), someone named Ngin Chiang Nguan (\$10,000), his office administrator (\$10,000), his wife's mother (\$10,000) his wife's father (\$10,000), his wife's sister (\$10,000), his wife's cousin's wife (\$10,000), and his wife's sister-in-law (\$10,000). None of these recipients are descendants of Judy. Eric claimed these were pursuant to oral instructions from his mother that were never written down and were communicated when only he was present. Most of these gifts were made between September and October 2010.

One of the focal points of the litigation was the disposition of the residence. As noted above, the trust provided that Eric's son would have the option to purchase the

residence at a 20 percent discount with the proceeds of the sale to be credited to the residue of the trust. However, on July 14, 2009 — the day Judy had her stroke — she executed a handwritten addendum. The document is written in shaky, barely legible handwriting and is entitled “Addendum to trust.” It states, “I, Judy Chang would would like to [illegible words crossed out] leave my house at 200 Friar Fullerton Calif to my son. [word crossed out] to Eric Chang.” It is signed by Judy and dated “14 July 2009.” This is the only alleged amendment to the trust that was created without the assistance of an attorney.

Only Eric was present when the “addendum” was created. Eric claims it was actually written on July 11th (which happens to fall just outside the two days prior to her stroke when she was experiencing weakness). However, Eric authorized an attorney to write a subsequent letter to Steven saying Judy executed the addendum on July 14, 2009. Despite acknowledging that the alleged addendum was an important document that he read at the time it was written, Eric claims he did not notice that it was misdated. Eric claims he did not tell her what to write, other than to title it “the addendum.” He claims the addendum is consistent with a wish his mother had expressed the month before, after seeing Steven’s new house.

In September 2010, Eric quitclaimed the residence from the trust to himself. In May of 2011, Eric rented out the house for \$1,750 per month, which is below market value. The residence was worth \$530,000 as of July 2009 (but likely worth more at the time of trial).

Eric took \$77,912.08 in “trustee’s fees.” These fees were calculated as 1 percent of the average balance of assets over a two-year period. As part of this fee, Eric compensated himself for mileage (\$2,808) and meals (\$10,800) for the task of visiting his mother. The visits apparently also required Eric’s wife to buy take-out for her children living at home — who were in their 20’s — rather than cook, for which Eric withdrew

\$5,400 from the Wells Fargo account. Eric testified this was consistent with Judy's strong desire not to be a burden on anyone.

After Judy's death, Eric debited a further \$10,400 from the Wells Fargo account. Eric acknowledged that the post-death withdrawals were not for Judy's benefit and said, "I'm willing to take that as a charge to me."

With regard to disbursements to the actual beneficiaries of the trust, between May 2007 and December 2010, Eric gave Steven various checks totaling \$87,340.12. He gave himself \$59,100. He gave his wife \$49,000. Steven's son Spencer received \$25,000 (not including various school expenses that were paid for him — all of the grandchildren were given money to fund their education.) Steven's daughter Victoria received \$35,000. Eric's son Phillip received \$49,000, plus \$120,000 to purchase a home (he later returned the latter funds, so that was essentially a no-interest loan). Eric's son Richard received \$85,000. Eric's daughter Liana received \$49,000.

Eric had no training in the law, had never served as a trustee, and had never served under a power of attorney. He had not been given any legal advice regarding his duties as a trustee until Steven filed a lawsuit against him.

Steven initiated the present lawsuit by filing a petition, which was subsequently amended, for "redress of breaches of trust." The petition alleged Eric breached his fiduciary duties by, among other things, regularly withdrawing money from the Wells Fargo account for his own benefit, donating money to California State University Los Angeles, gifting money to nonbeneficiaries, disbursing more money to his own children beneficiaries over other beneficiaries, utilizing trust money to renovate and repair a residence, and selling some of the oil stocks.

After a bench trial, the court ruled largely in favor of Steven. The court issued a detailed statement of decision, making the following findings.

The court found Eric breached his fiduciary duties in withdrawing a total of \$39,195.00 from the Wells Fargo account via ATMs, and the court surcharged Eric in

that amount. From the bench the court commented that Eric used the ATM card as “the functional equivalent of the trustee piggybank.”

The court found Eric breached his fiduciary duty in donating \$100,000 to California State University Los Angeles and \$4,000 to the Human Relations counsel, noting that these gifts “did not comport with the Trustor’s own intent or history of gifting.” The court surcharged Eric in those amounts.

The court found Eric breached his fiduciary duty in gifting a total of \$143,170.00 to nondescendants of Judy, and surcharged Eric in that amount.

The court found Eric breached his fiduciary duty in making unequal distribution to the descendants, especially his own children, and ordered the equalization of gifts and distributions.

The court found Eric breached his fiduciary duty in selling \$321,849.32 worth of oil stocks, and surcharged Eric in that amount with instructions that half of it be distributed to Steven. The court explained, “The sale was not necessary to achieve a cash position sufficient to pay for certain bills or taxes and was a poor selection for liquidation as well as a contravention of the Trustor’s clear estate plan which specifically devised the oils stocks to her two sons and as such is not to be used to pay expenses unless there are no other assets remaining.”

Regarding Eric’s trustee fees, the court found the reasonable fee to be \$3,000 and surcharged Eric \$68,000 that he had paid himself. The court explained, “[Eric] is not an institutional trustee paid on a percentage basis. There are many things that were done during Judy’s life that were claimed under a global percentage basis as having been done as trustee, but instead were family obligations, child obligations to parent and not actual work for the trust. Further, Eric . . . failed to keep time records of his activities as trustee.”

Regarding the alleged handwritten addendum, the court found it to be invalid on the basis that Judy “was not competent to make a knowing and understanding

change to her trust document.” The court cited Probate Code section 812.¹ In addition, the court found the addendum, regarding the house, was “precatory in nature and it is not to be considered a part of the trust” The court explained, “Judy Chang had a history of having an attorney draft her estate documents and amendments. This document was nothing more than a note that was to express future intent to change her trust. Words having meaning and that is a fact to be considered, in that the language did not indicate a present gift or testamentary intent but was precatory in nature.” And because the house never belonged to Eric, the court ordered Eric to disgorge the rents he made from the property in the amount of \$36,750. On the other hand, because the residence was being returned to the trust, the court found in favor of Eric on the issue of whether using trust money to renovate the residence was a breach of fiduciary duty.

Regarding attorney fees, Eric testified that the trust had paid approximately \$84,000 to Eric’s attorney to defend him in this action. The court denied most of those fees: “Eric T. Chang is denied payment of his attorney fees and costs from the trust if they were incurred to unsuccessfully defend against the instant petition: The Court finds that . . . monies paid as shown on the accounting in the amount of \$14,000.00 are approved. Any funds paid from the trust beyond that are disapproved and will be subject to reimbursement from [Eric]. The Court based its decision on the following facts: [¶] a. The attorney’s fees payable from the trust beyond \$14,000.00 are not justified for defending the virtually indefensible breach of trustee’s duties.”

Finally, the court removed Eric as trustee, stating, “There was an appalling lack of comprehension of the fiduciary responsibilities of a Trustee, an appalling lack of recordkeeping and that inferences drawn from the evidence weigh heavily against the party charged with the fiduciary responsibility.” With regard to a successor trustee, the

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All statutory references are to the Probate Code unless otherwise stated.

court did not follow the terms of the trust and appoint Eric's son Phillip, stating it "would be an impossible conflict of interest"²

In making these findings, the court declined to make a finding of bad faith, stating, "The Court attributes the breach of fiduciary duty to poor recordkeeping, poor accounting, and lack of legal advice that the trustee reasonably should have sought." Eric timely appealed.³

DISCUSSION

The Exculpatory Clause in the Trust Instrument Does Not Excuse the Breaches of Trust Found by the Court

Eric's first contention is that all of the surcharges are contrary to the trust instrument, which limits trustee liability as follows: "The Trustee will not be liable for any loss of the Trust estate of any separate Trust occasioned by acts in good faith in the administration of such separate Trust (including acts in reliance on an opinion of counsel) and in any event the Trustee will be liable only for willful wrongdoing, or gross negligence, but not for honest errors in judgment." (The Exculpatory Clause.) Eric contends that the trial court found there was no bad faith, and "there was no finding of gross negligence."

We disagree with Eric's interpretation of the court's statement of decision. While it is true the court did not use the term "gross negligence," the court made clear that it found Eric's conduct to be something more than simple negligence. For example, in deciding to remove Eric as successor trustee the court found he had demonstrated "an

² The trust actually designates Eric's son Richard, not Phillip, as the successor trustee.

³ Eric also separately appealed from an order awarding attorney fees to Steven. We address that issue in a separate opinion.

appalling lack of comprehension of the fiduciary responsibilities of a Trustee, [and] an appalling lack of records and recordkeeping” And in denying Eric’s attorney fees beyond \$14,000, the court found the additional fees were “not justified for defending the *virtually indefensible* breach of the trustee’s duties.” (Italics added.)

Further, the court’s findings regarding a lack of bad faith related to two distinct issues, neither of which negate a finding of gross negligence: (1) whether Steven was entitled to an award of attorney fees and costs under section 17211, subdivision (b) which requires that “the trustee’s opposition to the contest [must be] without reasonable cause and in bad faith”; and (2) whether Eric had “wrongfully taken, concealed, or disposed of property belonging to Judy Chang and/or her Trust” in bad faith and should thereby be surcharged double the value of the diverted property under section 859. As to the first issue, the presence or absence of good faith in opposing Steven’s claims in litigation has little or no bearing on whether Eric was grossly negligent in administering the trust. On the section 859 claim for a double surcharge, the court’s oral tentative decision from the bench, which was ordered to be made a part of the formal statement of decision, amplifies the court’s reasoning: “While I am here mightily disapproving of [Eric’s] efforts I can’t at this point say all right. His actions speak to me of some ulterior motive or bad faith.” “I don’t think here that he had some bad faith intention to do anything awful to his family members, particularly to his brother” But the absence of a “bad faith intention to do [something] awful to his family members” is not the same as the absence of gross negligence. “‘Gross negligence’ long has been defined in California and other jurisdictions as either a “‘want of even scant care’” or “‘an extreme departure from the ordinary standard of conduct.’”” (*City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 754.) The court’s description of Eric’s conduct as “appalling” aptly substitutes for a “want of even scant care” and “an extreme departure from the ordinary standard of conduct.”

Moreover, to the extent the court's findings are ambiguous, we will imply a finding of gross negligence. "If the statement of decision fails to decide a controverted issue or is ambiguous, any party may bring the omission or ambiguity to the trial court's attention either before the entry of judgment or in conjunction with a new trial motion or a motion to vacate the judgment under Code of Civil Procedure section 663. [Citations.] If an omission or ambiguity is brought to the trial court's attention, the reviewing court will not infer findings or resolve an ambiguity in favor of the prevailing party on that issue. [Citation.] If an omission [or ambiguity] is not brought to the trial court's attention as provided under the statute, however, the reviewing court will resolve the omission [or ambiguity] by inferring findings in favor of the prevailing party on that issue." (*Uzyel v. Kadisha* (2010) 188 Cal.App.4th 866, 896, fn. omitted.)

To adequately raise an ambiguity for the trial court's resolution, a party must perform "a two-step process: first, a party must request a statement of decision as to specific issues to obtain an explanation of the trial court's tentative decision [citation]; second, if the court issues such a statement, a party claiming deficiencies therein must bring such defects to the trial court's attention to avoid implied findings on appeal favorable to the judgment [citation]." (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1134; Code Civ. Proc., § 634 [findings not inferred if ambiguity brought to attention of court].) "To bring an omission or ambiguity to the trial court's attention for purposes of Code of Civil Procedure section 634, a party must identify the defect with sufficient particularity to allow the court to correct the defect." (*Uzyel v. Kadisha, supra*, 188 Cal.App.4th at p. 896.)

Eric partially fulfilled the first step in the process, but not the second. Each party filed a request for a statement of decision. Eric did *not* request a finding regarding gross negligence with respect to all of the alleged surcharges. With respect to the surcharges for the oil stocks and the ATM withdrawals only, he requested that the court provide the "legal and factual bases for the Court's decision" and specifically requested

that the court “comment on the effect of the provision in the Trust limiting the Trustee’s liability for ‘willful wrongdoing, or gross negligence, but not for honest errors in judgment.’” Steven’s counsel prepared a proposed statement of decision as ordered by the court. But Steven’s submission did not contain proposed findings regarding the presence or absence of gross negligence. And Eric’s objections to Steven’s proposed decision did not directly point out that he had requested findings on gross negligence, and that they were absent from Steven’s proposal. Instead, the objections were more obtuse. Eric simply objected to three proposed findings on the ground, *inter alia*, that, “[t]he proposed finding . . . is inconsistent with the limitations of Trustee liability set forth in the Trust at Page 8, Article V, Section 6.”⁴

The problem with this objection is that the Exculpatory Clause, which is quoted at the outset of this section of the opinion, is itself ambiguous and multifaceted. To start with, it refers to “any loss of the Trust estate of any separate Trust.” Presumably the reference to a “separate trust” is a holdover from Judy’s 1985 trust which had originally provided that “[e]ach share allocated to a living grandchild of Trustor shall be retained and administered by the Trustee in a separate trust” The 2007 operative trust does not refer to the establishment of separate trusts for the grandchildren, but instead directs the trustee to allocate the trust estate into “shares” for each of the beneficiaries, including the grandchildren. So given this history, does the Exculpatory Clause apply only to management of the grandchildren’s shares, or does it apply more broadly? It is unclear. The Exculpatory Clause also says the trustee is *not* liable for acts in good faith, *is* liable for willful wrongdoing, *is* liable for gross negligence, and is *not* liable for honest errors in judgment. Are these concepts mutually exclusive under the Trust? Which finding(s) did Eric want? The Exculpatory Clause is sufficiently

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This objection was made to the surcharges for Eric’s attorney fees in excess of \$14,000, the surcharge of the sale of the oil stocks, and the surcharge for excessive trustee fees.

ambiguous and multifaceted that merely pointing to it without requesting any particular factual finding was not the specificity needed to require the court to make any particular findings. Accordingly, to the extent the court's express findings failed adequately to state that Eric's conduct constituted gross negligence, Eric has failed to avoid the doctrine of implied findings. By that doctrine we imply the court found Eric's conduct to be grossly negligent.

There is, of course, still the question of whether the court's findings are supported by substantial evidence. To the extent Eric raises that issue, we address it *infra*.

The Court's Finding Regarding Judy's Competency to Execute the Alleged Addendum Was Sufficient

Next, Eric contends the court employed the wrong legal standard in deciding whether Judy was competent to execute the alleged addendum. The court found Judy "was not competent to make a knowing and understanding change to her trust document," citing section 812. That statute states, "Except where otherwise provided by law, including, but not limited to, Section 813 and the statutory and decisional law of testamentary capacity, a person lacks the capacity to make a decision unless the person has the ability to communicate verbally, or by any other means, the decision, and to understand and appreciate, to the extent relevant, all of the following: [¶] (a) The rights, duties, and responsibilities created by, or affected by the decision. [¶] (b) The probable consequences for the decisionmaker and, where appropriate, the persons affected by the decision. [¶] (c) The significant risks, benefits, and reasonable alternatives involved in the decision."

Eric contends the court should have analyzed the issue pursuant to section 6100.5, which states, "(a) An individual is not mentally competent to make a will if at the time of making the will . . . the following is true: [¶] (1) The individual does not have

sufficient mental capacity to be able to (A) understand the nature of the testamentary act, (B) understand and recollect the nature and situation of the individual's property, or (C) remember and understand the individual's relations to living descendants, spouse, and parents, and those whose interests are affected by the will.” (Italics added.)

In contending the court erred by relying on the wrong legal standard, Eric relies on *Andersen v. Hunt* (2011) 196 Cal.App.4th 722 (*Andersen*). In *Andersen* the decedent's children sought to invalidate a trust amendment that left a significant portion of the estate to the decedent's girlfriend. (*Id.* at p. 725.) The trial court found the decedent lacked capacity to execute the amendment. The *Andersen* court ultimately concluded “the probate court erred when it evaluated [decedent's] capacity to execute the trust amendments by the general standard of capacity set out in . . . sections 810 to 812, instead of the standard of testamentary capacity set out in . . . section 6100.5.” (*Ibid.*)

To reach this result, the *Anderson* court acknowledged that sections 810 to 812 apply by their terms to trusts, and section 6100.5 does not, and thus the decedent's “capacity must be evaluated under sections 810 to 812, not section 6100.5.” (*Andersen, supra*, 196 Cal.App.4th at p. 730.) So how did the *Andersen* court then reach the opposite result? First it noted that sections 810 to 812 do not “set out a single standard of ‘contractual capacity.’” (*Andersen*, at p. 730.) “To the contrary, section 811, subdivision (a) provides that a determination that a person lacks capacity to make a decision or do a certain act, including without limitation ‘to contract, . . . to execute wills, or to execute trusts,’ must be supported by evidence of a deficit in one of the statutorily identified mental functions *and evidence of a correlation between the deficit and the decision or act in question*. Section 811, subdivision (b) contains similar language, stating that a deficit in one of the statutorily defined mental functions may be considered *only* if it significantly impairs the person's ability to appreciate the consequences of his or her actions *with regard to the type or act or decision in question*. And section 812 provides that a person lacks capacity to make a decision only if he or she cannot appreciate the

rights, duties, consequences, risks and benefits ‘*involved in the decision.*’ (Italics added.) Accordingly, sections 810 to 812 do not set out a single standard for contractual capacity, but rather provide that capacity to do a variety of acts, including to contract, make a will, or execute a trust, must be evaluated by a person’s ability to appreciate the consequences *of the particular act he or she wishes to take.*” (*Ibid.*) The court then concluded, “When determining whether a trustor had capacity to execute a trust amendment that, in its content and complexity, closely resembles a will or codicil, we believe it is appropriate to look to section 6100.5 to determine when a person’s mental deficits are sufficient to allow a court to conclude that the person lacks the ability ‘to understand and appreciate the consequences of his or her actions with regard to the type of act or decision in question.’ [Citation.] In other words, while section 6100.5 is not directly applicable to determine competency to make or amend a trust, it is made applicable through section 811 to trusts or trust amendments that are analogous to wills or codicils.” (*Id.* at p. 731.)

In short, pursuant to sections 810 to 812, when confronted with whether a person has capacity to execute a trust amendment, a court must first analyze the complexity of the amendment to determine the proper legal standard by which to measure capacity. Where the trust amendment is simple in nature, akin to a simple will, the lower standard of capacity found in section 6100.5 applies.

By contrast, where the amendment is more complex in nature, a higher standard applies. As a general rule, the standard of capacity needed to form a trust is the capacity to contract. As we explained in *In re Marriage of Greenway* (2013) 217 Cal.App.4th 628, “the capacity to contract (which includes the capacity to convey, create a trust, make gifts, and grant powers of attorney) . . . is contained in . . . sections 811 and 812. But Civil Code Section 39, subdivision (b), provides more specific guidelines for determining the capacity to contract. ‘A rebuttable presumption affecting the burden of proof that a person is of unsound mind shall exist for purposes of this section if the person is substantially unable to *manage his or her own financial resources or resist*

fraud or undue influence.” (*Id.* at p. 642.) We explained this standard stood in contrast to the “exceptionally low” standard of testamentary capacity. (*Ibid.*) The contract standard is higher in the sense that one may have a higher level of mental capacity and still be found incompetent under this standard — i.e., one can understand the nature of a testamentary act, and thus be competent under section 6100.5, but not be functional enough to manage one’s own finances and thus be incompetent under Civil Code section 39, subdivision (b).

In *Lintz v. Lintz* (2014) 222 Cal.App.4th 1346 (*Lintz*) the court applied this framework to a trust and found the court erred in applying section 6100.5. In *Lintz* the decedent amended his trust numerous times to give more and more of his estate to his wife, and less to his children of a previous marriage, ultimately culminating in executing a new trust that effectively disinherited his children. (*Id.* at p. 1350.) Applying section 6100.5, the trial court found decedent had the capacity to implement the amendments to his trust as well as execute the new trust. (*Id.* at pp. 1350-1351.)

After analyzing *Andersen*, the *Lintz* court held this was error because of the complexity of the trust instruments in question: “The trust instruments here were unquestionably more complex than a will or codicil. They addressed community property concerns, provided for income distribution during the life of the surviving spouse, and provided for the creation of multiple trusts, one contemplating estate tax consequences, upon the death of the surviving spouse.” (*Lintz, supra*, 222 Cal.App.4th at pp. 1352-1353.)

Here, the trial court never engaged in the process of analyzing the complexity of the trust instrument. But given its simple nature — it merely changed the beneficiary of a single piece of property — we hold section 6100.5 was the proper standard by which to measure Judy’s capacity.

That said, the court’s failure to determine the proper standard did not result in error. The court cited section 812. As *Andersen* explained, section 812 is applicable,

but indeterminate. It does “not set out a single standard for contractual capacity, but rather provide[s] that capacity to do a variety of acts, including to contract, make a will, or execute a trust, must be evaluated by a person’s ability to appreciate the consequences *of the particular act he or she wishes to take.*” (*Andersen, supra*, 196 Cal.App.4th at p. 730.) The court’s actual finding was that Judy “was not competent to make a knowing and understanding change to her trust document.” Under section 6100.5, the court was required to determine whether Judy could “understand the nature of the testamentary act.” (*Id.* subd. (a)(1).) The court’s language is functionally equivalent to the language used in section 6100.5. Consequently, despite failing to analyze the complexity of the trust amendment to determine the proper standard for capacity, the court ultimately determined capacity based on the correct standard and thus did not err.⁵

The Order Surcharging Eric for the Sale of Oil Stocks Was Error

Next, Eric contends the court should not have surcharged him \$321,849.32 for the sale of the oil stocks because that money went into the trust. Steven makes almost no effort to defend this aspect of the court’s ruling. We agree it was error.

A trustee can be surcharged for losses to the trust or profits earned as a result of a breach of duty: “(a) If the trustee commits a breach of trust, the trustee is chargeable with any of the following that is appropriate under the circumstances: [¶] (1) Any loss or depreciation in value of the trust estate resulting from the breach of trust, with interest. [¶] (2) Any profit made by the trustee through the breach of trust, with

⁵ Because we affirm the court’s finding that Judy lacked capacity to execute the addendum, we need not address the court’s finding that the addendum is merely precatory in nature. Additionally, for the first time in his reply brief, Eric argues that the testimony of Steven’s expert on mental capacity did not constitute substantial evidence. Because this argument was not raised in the opening brief, it is waived. (*West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 799.)

interest. [¶] (3) Any profit that would have accrued to the trust estate if the loss of profit is the result of the breach of trust.” (§ 16440, subd. (a)(1)(2)(3).)

When Eric sold the oil stocks, the proceeds went into the trust⁶ to be used for general trust purposes. Thus, the trust did not lose value by the sale of oil stocks. Steven may have been damaged in that he did not timely receive a distribution he was entitled to, but there is no contention that the trust is incapable of correcting that by giving Steven his due, particularly after Eric pays the surcharges on the large donations to charities and nondescendants. Thus there is no basis for surcharging Eric for the proceeds of the oil stocks. Nor is there any contention or evidence that the oil stocks would have been worth more at the time of Judy’s death had they not been prematurely sold. Thus there is no basis for surcharging Eric in any amount for the sale of the oil stocks. Moreover, by surcharging Eric for both the proceeds of the sale of the oil stock and also the charitable donations and other improper distributions those proceeds funded, the court improperly double charged Eric.

The Surcharge for the Charitable Donations Should Have Been Offset by Tax Savings to the Trust

Next, Eric contends the surcharges for the charitable donations should have been discounted to reflect tax savings that benefited the trust as a result of the donations. The unrefuted evidence was that the trust paid \$24,147 less in taxes as a result of the donation to California State University Los Angeles. When Eric requested this offset, the court simply stated “I will not.” Steven makes no effort to defend this aspect of the court’s ruling. As set forth above, a trustee is chargeable for losses to trust, or profits the trustee made. (§ 16440, subd. (a)(1)(2).) Eric made no profit on the charitable donation, and the tax savings mitigated the loss of the donation. Accordingly, the \$104,000

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As noted above, the proceeds were deposited into the Wells Fargo account which, although not opened as a trust account, was treated as an asset of the trust for all purposes.

surcharge for the charitable donations should be reduced by \$24,147, for a total of \$79,853.⁷

There Was No Error in Requiring Eric to Bear Most of His Own Attorney's Fees

Eric contends the court erred in requiring that he pay back money paid from the trust as his attorney fees for defending him in the present action. Eric cites article V, section 1(k) of the trust, which confers on the trustee the authority “To commence or defend, at the expense of the Trust, such litigation with respect to the Trust or any property of the Trust estate as the Trustee may deem advisable, and to compromise or otherwise adjust any claims or litigation against or in favor of the Trust.” Eric essentially contends he is entitled to his fees as a matter of law.

However, the correct rule of law is as follows: “Allowance of compensation rests in the sound discretion of the trial court, whose ruling will not be disturbed on appeal in absence of a manifest showing of abuse. [Citations.] In determining compensation for trustee and attorney fees the court has the right to consider actions of the trustee in improper use of trust funds. [Citation.] An estate may not be charged with fees incurred in unsuccessfully contesting a trustee’s surcharge.” (*Estate of Cassity* (1980) 106 Cal.App.3d 569, 572.) Eric has not even attempted to argue that the court abused its discretion, and we find no such abuse.

Nevertheless, because we are reversing a substantial portion of the surcharges awarded against Eric, we will remand for a reassessment of whether Eric is entitled to his fees. In so remanding, we express no opinion on how the court should rule.

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Eric also contends, somewhat half-heartedly, that there was no evidence to support the surcharge for the charitable donations, nor the various gifts to nondescendants. However, he fails to cite any provision in the trust that would permit such donations, and there is no question that he made the donations on behalf of the trust. The evidence clearly supports a surcharge.

We remand simply because the circumstances under which the court must exercise its discretion have changed.

DISPOSITION

The order surcharging Eric \$321,849.32 for the sale of the oil stocks is reversed. The order surcharging Eric \$104,000 for charitable donations to California State University Los Angeles and Orange County Human Relations is corrected to be \$79,853. The order denying Eric his attorney fees is reversed and remanded for the court's reconsideration in light of the disposition of this appeal. In all other respects the judgment is affirmed, with the exception of the attorney fees awarded to Steven, which is addressed in a separate, concurrently-filed opinion. Each party shall bear their own costs on appeal.

IKOLA, J.

WE CONCUR:

ARONSON, ACTING P. J.

THOMPSON, J.